Supreme Court, U.S.
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No. 87-5840

In The

Supreme Court of the United States

October Term, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

August 10, 1981 – Petition to Terminate the Rights of a Father (CC 7017(b)) and Order for Investigation and Report, in the Superior Court of the State of California

October 2, 1981 – Answer & Declaration to Petition, by Edward McNamara, in the Superior Court

December 18, 1981 – Trial in the Superior Court

February 9, 1982 – Memorandum Decision, in the Superior Court

February 26, 1982 – Judgment and Order Terminating Rights of a Father, in the Superior Court

April 29, 1982 – Statement of Decision, in the Superior Court

October 22, 1984 – Judgment of the Supreme Court of the State of California, reversing and remanding for further proceedings (with dissent)

February 25-27, 1985 – Further hearing in the Superior Court

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March 7, 1985 – Judgment Terminating the Rights of an Alleged Natural Father, Respondent Edward McNamara, in the Superior Court

April 30, 1987 – Judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirming (with a concurring opinion and a dissenting opinion)

June 8, 1987 – Petition for Hearing to the Supreme Court of the State of California

July 30, 1987 – Order Denying Review After Judgment by the Court of Appeal, in the Supreme Court of the State of California

October 27, 1987 – Notice of Appeal to the Supreme Court of the United States, in the Court of Appeal of the State of California

October 28, 1987 – Appeal docketed in the Supreme Court of the United States

April 18, 1988 – Jurisdiction postponed to the hearing on the merits

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IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

In the Matter of the Petition to Terminate the Rights of the Alleged Natural Father, EDWARD McNAMARA, to ___ ___ MILLER, a Minor	No. 24905 PETITION TO TERMINATE THE RIGHTS OF A FATHER (CC7017(b)) AND ORDER FOR INVESTIGATION AND REPORT [Filed August 10, 1981]

Petitioner is the San Diego County Department of Social Services a licensed adoption agency. The San Diego County Department of Social Services, through its authorized representative, is informed and believes and upon such ground alleges:

1. That the minor, ___ ___ MILLER, resides in the County of San Diego; that said minor was born in San Diego, California on July 18, 1981.

2. That said minor is in Petitioner's custody by virtue of the mother's relinquishment.

3. That said minor has no presumed natural father as defined by Civil Code Section 7004.

4. That EDWARD McNAMARA is the alleged natural father of said minor.

5. That it is in the best interests of said minor to terminate the rights of the alleged natural father so that she may become available for adoption.

WHEREFORE, your Petitioner prays that this honorable court inquire into these matters, that the rights of said alleged natural father be terminated and that

the court order that only the consent of the mother of said child is required for adoption.

Dated: August 10, 1981.

DONALD L. CLARK, County Counsel
By /s/ Arlene Prater
ARLENE PRATER, Deputy
Attorneys for Petitioner

VERIFICATION

* * * *

ORDER

The Petition to Terminate the Rights of a Father having been filed and considered by the Court, and GOOD CAUSE APPEARING THEREFOR,

The San Diego County Department of Social Services, Adoptions Division, is hereby ordered to perform the investigation as to the identity of the natural father required by subsection (c) of Civil Code Section 7017, as to the natural father of ___ ___ MILLER, a minor, and report thereon to the Court in writing within 30 days, by filing the original with the County Clerk, Attention Adoptions Division, on that date and sending a copy to Arlene Prater, Deputy County Counsel, at County Mail Station A12.

Dated: AUG 10, 1981.

/s/ G. Dennis Adams
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

(Title Omitted in Printing)

CASE NO. A 24905

ANSWER & DECLARATION
TO PETITION

[Filed October 2, 1981]

I, EDWARD McNAMARA declare and say:

1. I am the natural father of the minor child in question.

2. I do not wish that my parental rights as Father be terminated by this court.

3. I wish to have legal custody and physical custody of my child.

4. I am in the process of having LEGAL AID represent me in this matter as I cannot afford an attorney. As yet, I have not had my first appointment with them.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of October, 1981.

/s/ Edward McNamara
EDWARD McNAMARA

[Trial in the Superior Court was held December 18, 1981. The reporter's transcript is part of the certified record in 4th Civil No. 26793 of the California Court of Appeal.]

SUPERIOR COURT FOR THE
STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A 24905

MEMORANDUM DECISION

[Filed February 9, 1982]

This matter came on regularly for trial on December 18, 1981, and, after the presentation of evidence and argument, supplemental points and authorities were requested. Upon their receipt the matter was taken under submission.

This Court has previously ruled that respondent is the alleged but not the presumed father of the child. He was never married to the mother, never cohabited with her, and never took the child into his home as his own. Under these circumstances the law accords him very few rights vis-a-vis the child, i.e., a right to notice and to be heard.

The Court finds that only the consent of the mother is required for the adoption of the child. While there is evidence that Mr. McNamara is a capable parent to his boys, the child who is the subject of this action has been with her adoptive parents since birth, is thriving, and has become a part of a family unit.

The burden of proof in this action is on the father to prove parentage and that his custody would be in the best interest of the child; the father has proved his biological parentage, but has failed to persuade the Court by a preponderance of the evidence that it would

be in the best interest of the child for the father to have custody.

Therefore, the petition will be granted as prayed for.

DATED: February 8, 1982.

/s/ Judith McConnell
JUDGE OF THE SUPERIOR COURT

[The superior court Judgment and Order Terminating Rights of a Father was filed February 26, 1982, Jurisdictional Statement Appendix, p. 64a.]

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A 24905

STATEMENT OF DECISION
(C.C.P. Section 632)

[Filed April 29, 1982]

Pursuant to Respondent's request for Finding of Fact and Conclusions of Law in the above-matter and the Order of the Court signed on March 3, 1981, petitioner submits the following Statement of Decision, over objection, pursuant to Code of Civil Procedure Section 632 and Rule 232 of the California Rules of Court, as amended.

The above-entitled case came on regularly for trial on December 18, 1981, before the Honorable Judith McConnell, judge presiding, in Department One of the above-entitled court. Petitioner, San Diego County Department of Social Services appeared by its attorney Donald L. Clark, County Counsel, by Janet B. Houts, Deputy County Counsel. Respondent Robert McNamara appeared personally and through counsel, Joseph D'Addario, Esq., and James E. Bunker, Esq., appeared as amicus curiae.

Evidence, both oral and documentary, was introduced on behalf of all parties and the matter taken under submission for decision.

On or about February 8, 1982, Judge McConnell isused (sic) a Memorandum Decision which was filed on February 9, 1982, and which stated the proposed decision to grant said petition. Judgment and order terminating rights of respondent father, Robert

McNamara, was signed and filed on February 26, 1982. Thereafter on March 3, 1982, the within request was filed.

During trial it was determined, and the court found in its Memorandum Decision, the respondent, Robert McNamara, was the alleged, not the presumed natural father of Baby Girl Miller. He was never married to the mother, never cohabited with her, and never took the child into his home as his own. As an alleged father of the child, he possesses few rights, but may have a right to be heard. His consent is not required for the adoption of the child; only the mother's consent is necessary. He has the burden of proving biological parentage, which the court found he fulfilled. He also has the burden of proving that custody with him would be in the best interests of the child, which the court found he failed to satisfy. Although he is a capable parent to his two sons, the minor child in this action has been with the adoptive parents since birth and has become a part of that family. Said child was placed with an adoptive family because the mother relinquished her and respondent initially expressed no desire to have custody of her.

It is in the best interests of the child to have her remain with the family who has cared for her almost all of her life and to be adopted by them. Accordingly, the Petition to Terminate the Rights of the Alleged Natural Father, Robert McNamara to Baby Girl Miller, is granted.

DATED: 4-29-82

/s/ Judith McConnell
Judge of the Superior Court

In the Supreme Court of the State of California

No. L.A. 31786
Filed October 22, 1984
In re Baby Girl M.
San Diego County Department of Social Services,
Plaintiff and Respondent,
v.
Edward M.,
Defendant and Appellant.

reported at 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918

[The opinion of the court is at Jurisdictional Statement Appendix, p. 36a.]

[The opinion of Mosk, J., dissenting, is at Jurisdictional Statement Appendix, p. 51a.]

[The Remittitur, filed November 26, 1984, is at Jurisdictional Statement Appendix, p. 66a.]

Superior Court of California,
County of San Diego

[Further hearing was held February 25, 26, and 27, 1985. The reporter's transcript is part of the certified record on appeal in 4th Civil No. D003076 of the California Court of Appeal.]

Superior Court of California,
County of San Diego

Appellee's excerpts from report of Gerald E. Nelson, M.D., dated February 22, 1985, received in evidence on further hearing as Petitioner's (Appellee's) Exhibit 1:

SUMMARY OF THE EXAMINATION:

Katie is a 3 ½ year old girl who has lived with her family since infancy and who has grown and developed into a normal, healthy, well-adjusted child. She has a close, trusting attachment to her mother and father as well as to her 6 year old brother. She has a good sense of who she is and relates to her family and to others in a trusting, conflict-free manner. She percieves (sic) of her foster-parents as her psychological parents. Her parents, Robert and Pamela Moses, are normal, well-adjusted adults who care deeply for Katie and percieve (sic) of her as though she were their natural child.

Through all of the past 3 ½ years of stress and anxiety, Katie has been protected from the uncertainties which surround her custody. She shows no evidence of having been traumatized or stressed by the long controversy. She is a bright, sensitive child who has learned how to behave well, relate well, and learn. She appears to have a good, strong conscience. Her parents have been conscientious in their child-rearing and have formed a strong, trusting attachment between herself and them.

DETRIMENT:

It is highly likely that Katie will suffer extreme psychological and emotional harm if she were removed from the care and custody of her psychological parents, Robert and Pamela Moses. The child psychiatric literature is replete with books and articles describing the devastation children suffer if they lose their parents, whether by death, divorce, or other reasons. Such losses should be avoided if at all possible.

The work done by John Bowlby, M.D. on attachments, separation, and loss between parent and child pertains specifically in this case. He describes the three phases of a child of 15 to 30 months will undergo if it should lose its mother. The first phase is termed "protest" and during it "the young child appears acutely distressed at having lost his mother and seeks to recapture her by the full exercise of his limited resources. He will often cry loudly, shake his cot, throw himself about, and look eagerly towards any sight or sound which might prove to be is missing mother. All his behavior suggests strong expectations that she will return. Meanwhile, he is apt to reject all alternative figures who offer to do things for him; though some children will cling desperately to a nurse." He is withdrawn, makes no demands on people in theenvironment (sic) and appears to be in a state of deep mourning. This is a quiet stage, and sometimes, clearly erroneously, is presumed to indicate a diminution of distress.

The phase of despair is a painful one and also may last several weeks or months. The feelings of hopelessness, despair, sadness, and anger are easily engaged if

a child is seen at this phase of mourning. Regression to previous levels of adaptation and coping become evident. The child appears sad and withdrawn, looses (sic) her appetite, oftentimes has disturbed sleep patterns, and will become clinging and the physical movements diminish or come to an end, and he may cry monotounously (sic) or intermittently."

Despair is not the end of the childs (sic) intense feelings, but a change. The child remains preoccupied with his or her need to be reunited with her parents and is vigilent (sic) for her mother's return. Every time a door opens or a woman walks by, the child quickly scans and is alert to see if this is her mother returning. The feelings of an observer are one of empathic pain and anguish, feeling the child's yearning to be reunited with her mother.

The next phase is called detatchment (sic). The child seems to lose her interest in her mother and to become emotionally detached from her. it (sic) is apparant that the child's psychological defenses are operating so as to remove the internal pain which the loss of the parent, particularly the mother, has caused. This process too can last for several months.

The mourning process that a small child goes through when she has lost her parent can last for several months usually, and may last indefinitely. How a child responds to the loss depends on the child's underlying tempermant. Despite differences in temperment (sic), all children grieve and suffer prolonged anguish if they lose their parents.

What is the sequellae of a child undergoing such a loss? In general children regress to previous developmental levels while they are undergoing this profound psychological and emotional trauma. Katie will regress in the area of speech, affective function (how she deals with strong feelings. She will tend to use more infantile ways of expressing anger, sadness, jealousy or any other feelings.) Her speech will regress to where she will likely use less complex forms of speech and she may begin to stutter or stammer or become dysfluent in her articulation. She is likely in her vegatative (sic) function to regress. Her sleep will become disturbed. She will likely have nightmares or night terrors. She will be wakeful at night, having difficulty going to sleep and staying asleep. she (sic) will tend call out for her mother at night, confused and forgetting that her mother is no longer there, and she will cry for long periods of time at night for her mother. Her appetite will diminish and she will become finicky and picky about which food she will eat. She will regress in her motor function. She will be less likely to walk alone, she will want to be carried or held frequently. She will lose interest in manipulating objects and will tend to stimulate herself in infantile ways. She might start rocking, head banging, fingering her hair, sucking her thumb, and there will be clear evidence of psychomotor retardation. It is unlikely that there will be a change in her sexual function or development.

Katie's general development will have stopped, and her psychological growth will regress as she attempts to deal with devastating loss of her parents. While she is regressing, she is not growing and developing. Katie

will loose (sic) 6 months to a year of emotional and psychological development, some of which she may not recover.

Long term effects have been long noted in the psychiatric literature. James Anthony found "The findings thus far in this study strongly support the hypothesis that parental loss in childhood is an important factor in the development of suicidal tendencies and there is some evidence that these tendencies are related to disturbances in current object relations.

It is of particular interest that there seems to be *no essential difference* in terms of the development of significant suicidal ideation between subjects substaining (sic) parental loss because of death of a parent from those suffering loss because of parental separation." Dr. Noshpitz says "Any premature removal of the child from his mother, from his father, or from the child's familiar enviornment (sic) will plunge him into a developmental crisis".

He goes on to state "Prolonged absense (sic) of the parent from the home or parental death incline the child toward chronic affective and cognitive disorganization and discontent." The Cass and Thomas 1979 study stated that "the loss of a parent before age 6 and a broken home were more frequent occurrences in the most disturbed group. Impulsiveness, poor relationships with adults, accident proneness, and resistiveness were also more prevalent in the most disturbed group."

Bowlby has stated in Vol. 3, *Attachment and Loss*, "Loss of a loved person is the most intensely painful of

experiences any human being can suffer. And not only is it painful to experience, it is also painful to witness, if only because we are so impotent to help. To the bereaved, nothing except the return of the lost person can bring true comfort; should what we provide fall short of that it is felt almost as an insult.

Again and again, emphasis will be placed on *the long duration of grief*, on the difficulties of recovering from its effects, and on the adverse consequences for personality functioning that loss so often brings. Only by taking serious account of the facts as they seem actually to be, is it likely that we will be able to mitigate pain and disability and to reduce the casualty rate."

"At one time it was confidently believed that a young child soon will forget her mother, and so gets over her misery. Grief in child, it was thought, was short lived. Now however, more searching observation has shown that this is not so. Yearning for mother's return lingers on".

"The ways in which children and adolescents respond to the loss of a parent differ from the ways in which adults mourn the loss of a parent or a spouse. In so far as there are differences they turn mainly on the finding that children and adolescents are even more sensitive to the conditions that precede, surround, and follow a loss than are adults."

"Looking after a grieving child is exacting and unrewarding work; and it is small wonder that caregivers become impatient and irritable. After a small child has lost a parent, therefore, it is by no means

unusual for him to be subjected to strong pressure to "forget" his grief and, instead, to become interested in whatever his current caregiver thinks may distract him".

As stated by Erna Furman, "Some studies of adult patients judge that parental berievement in childhood is a significant factor in etiology of various forms of mental illness and adult maladjustment. Several writers focus on a category of disturbances in which childhood bereavement leads to an interference in development and results in arrest, regression, or distortion of the personaiity."

All studies of children who have lost their parents at age 3½ suggest profound psychological and emotional regression following such a loss and frequent long-term serious effects of their subsequent mental health. There is no doubt that Katie will suffer profound psychological and emotional trauma if she loses her psychological parents. She is now a bright, happy, well-adjusted child. She trusts her parents to provide a safe, protective, nuturing (sic) environment for her. To remove her from the care and custody of these parents would cause immediate psychological and emotional sequellae. Long term effects are more difficult to predict, but it is likely that she will become depressed and sensitized to future loss. This means that if she suffers loss, as she surely will in the future, she will relive similar psychological and emotional symptoms as she will suffer if she loses these parents. Namely, she will feel like a 3 ½ year old child who has lost her parents. This will recur every time she loses someone of significance. This might include a boyfriend, a spouse, a child,

or a parent, or a friend. This will render her vulnerable to clinical depression, an anxiety state, or she might use her psychological defenses to "numb out" the emotional pain, thus rendering her less sensitive to her human enviornment.

CONCLUSION:

Katie has lived with her current caretakers for 3½ years. She percieves them as her psychological parents. To remove her from the care and custody of these caretakers would cause devastating immediate sequellae which would last several months and would profoundly effect her development. It would also make her vulnerable to mental illness later in life. It is therefore my professional opinion that to remove Katie from her present home and place her in the care and custody of her natural father would be a detriment.

Respectfully submitted,

/s/ Gerald E. Nelson, M.D.
Gerald E. Nelson, M.D.

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

(Title Omitted in Printing)

No. A24905

REPORTER'S PARTIAL TRANSCRIPT

WEDNESDAY, FEBRUARY 27, 1985

[This portion of the transcript appears at pages 31-34 of volume II of the reporter's appeal transcript, February 27, 1985, in the certified record on appeal in 4th Civil No. D003076 of the California Court of Appeal.]

(p.1) SAN DIEGO, CALIFORNIA, WEDNESDAY, FEBRUARY 27, 1985, 10:49:

The Court: I note for the record that all counsel are once again present, as well as the parties.

I considered taking the matter under submission and writing out a decision, but I don't think anyone wants to wait any further. And so I apologize for the brief delay, but I think it's more appropriate that I rule from the bench in this case.

I would like to add that I have taken the time since yesterday to read the record from the prior file. I've also read and reread my notes of the testimony that has been received in this proceeding, as well as the cases submitted and argued by counsel.

Naturally I've read numerous times the decision of the Supreme Court to make sure that I have a feel for what my task is in this case.

And I think it's not my job at this point to assess fault with anyone for the history that's led us to this

date, the problems that have come about, and so I won't do that. I'm not going to lay blame for any of these problems on anyone's doorstep.

My job, as I understand it, is to determine whether an award of custody of this child to her parent, the father, Mr. MacNamara (sic), would be detrimental to her.

And the evidence that I have before me consists of, first of all, the testimony and report of Dr. Nelson, who is and (sic) experienced, board-certified child psychiatrist, (p.2) familiar with problems that children encounter when they suffer separation.

And his opinion was that removal of Katey (sic) from the only home that she's ever known would cause extreme psychological and emotional harm to her.

He found her to be a bright, happy, well-adjusted child, who would suffer profoundly if she were removed from the Moses home.

Furthermore, it is likely in his opinion that she would become depressed and sensitized to future loss, and vulnerable to mental illness later in life.

Dr. Nelson further stated that even with a slow removal from the Moses home, the child would suffer less harm ostensibly, but the trauma would still be great, and she would still suffer detriment as great as with a sudden removal. It would just be prolonged over a longer period of time.

The other evidence I have on the subject of detriment is the evidence of Dr. Lamson. Frankly, her testimony carries less weight, both because of her lesser

qualifications vis-a-vis Dr. Nelson, but also because of her lack of familiarity with the participants.

But I would also like to note a couple of things from her testimony. She testified that there would certainly be trauma to Katey (sic) – and I think those are her exact words – to be removed from the Moses home; and there could be permanent detriment.

She also said the trauma would be great here because (p.3) the child would lose the two parents that she has known virtually since birth, and they would be replaced by a man was is a stranger to her.

In other words, she did not disagree with the testimony given by Dr. Nelson.

I find the evidence is clear and convincing and, in fact, uncontradicted that Katey (sic) would suffer extreme emotional and psychological harm should she be removed from the Moses home. And this harm constitutes detriment within the meaning of civil code 4600.

I find that it would be in the best interest of the child that custody be awarded to Mr. and Mrs. Moses, who are in almost every sense the true parents of this child.

They have indicated that they will include Mr. MacNamera (sic) in Katey's (sic) extended family, and I encourage them to do so.

The petition under 7017 is granted.

Mr. D'Addario: Your honor, on behalf of Mr. MacNamera (sic), we would request a statement of decision on this matter.

The Court: All right. I will request the court reporter to transcribe the statements that I have just made, and that will constitute a statement of decision.

Mr. D'Addario: That's fine, your honor.

(Matter concluded at 10:15 A.M.)

(Certificate Omitted in Printing)

In The Superior Court of the State of California
In and for the County of San Diego

In re Baby Girl M., a Minor.	)	No. A 24905
COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES, Petitioner,	)	JUDGMENT TERMINATING THE RIGHTS OF AN ALLEGED NATURAL FATHER, RESPONDENT EDWARD McNAMARA.
v.	)	
EDWARD M., Respondent.	)	[Filed March 7, 1985]

The petition of the San Diego County Department of Social Services, a licensed adoption agency, for an order terminating the rights of respondent Edward McNamara, alleged natural father, to the minor, Baby Girl Miller, pursuant to Civil Code Section 7017(b) came on for further proceedings pursuant to the remand of the California Supreme Court in *In re Baby Girl M.* [1984] 37 Cal.3d 65 on February 25, 26, and 27, 1985 before the Honorable Judith McConnell, Judge Presiding. Petitioner appeared by its counsel Lloyd M. Harmon Jr., County Counsel, by Arlene Prater, Deputy County Counsel; respondent Edward McNamara appeared personally and through counsel Joseph D'Addario, Esq.; and Lee W. Selvig, Esq., appeared as amicus curiae on behalf of the adoptive family. The court having heard and considered the evidence of the parties and the matter having been submitted to the Court for decision and the Court being fully apprise (sic) in the premises and the Court having rendered its oral Statement of Decision and the Court having found by clear and convincing evidence that:

1. An award of custody to respondent Edward McNamara would be detrimental to the subject minor, Baby Girl Miller, and

2. An award of custody of Baby Girl Miller to petitioner non-parent is required to serve the best interests of said minor;

WHEREFORE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the rights of the alleged natural father, respondent Edward McNamara, to the subject minor, Baby Girl Miller, are terminated.

DATED: 3-7-85

/s/ Judith McConnell
Judge of the Superior Court

APPROVED AS TO FORM:

/s/ Joseph D'Addario
JOSEPH D'ADDARIO, ESQ.
ATTORNEY FOR RESPONDENT

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
* * *

March 25, 1987

Joseph D'Addario, Esq.
* * *

Ms. Arlene Prater
* * *

Lee W. Selvig, Esq.
* * *

Re County of San Diego Department of Social Services v. Edward M. - D003076

Dear Sir/Madam:

The parties are hereby notified the above-entitled case has been set for oral argument April 13, 1987 at 1:30 p.m. to permit them to address the following concerns of one or more members of the court. Each party may submit relevant points and authorities in letter form, at or before the time of oral argument.

Bearing in mind a section 7017 hearing is directed at terminating Edward's parental rights entirely, and only indirectly affects custody of his child, it can be argued the Department's action may have unconstitutionally prevented Edward from developing his protected opportunity interest to establish a parenting relationship which would allow him to withhold consent to adoption.

Analyzing United States Supreme Court decisions, one commentator concludes a fit and willing natural father has a constitutionally protected right to parent his child when he makes a timely effort, subject only to

the possibly paramount custodial right of the mother. (Buchanan, The Constitutional Rights of Unwed Fathers Before and After *Lehr v. Robinson* 45 Ohio State L.J. 313, 381-382.) When, as here, the State interferes with the natural father's parenting interests, the constitutional considerations come into play. Unlike most cases where parental rights are terminated with no showing of parental unfitness, here the State itself has physically barred Edward from developing a presumed parent status *and* has placed the child with a pre-adoptive couple whose interest is to maintain permanent custody and to develop a strong parent-child relationship. This was done two weeks after Edward expressed his desire to obtain custody and the mother abandoned her interest in the child by relinquishing her to the State. (See *W.E.J. v. Superior Court* (1979) 100 Cal.App.3d 303, 312.) Thus, the undisputed facts appears to be Edward promptly attempted to develop a parenting relationship, including custody before his daughter was placed in a pre-adoption home; the Department ignored Edward's desires without investigating his ability or fitness to assume custody and removed the child from a temporary placement to one intended to be permanent; Edward has always been willing and capable of providing loving and adequate parenting for his daughter; the juvenile court's decisions have been based on the significance of the "bonding" between the child and the pre-adoptive couple.

It appears this case is unlike most, if not all, those discussed in reported decisions in that it is the State which has both deprived Edward of his opportunity to retain his parental interests by becoming a presumed

father *and* elected to immediately place the child with a pre-adoptive couple to create the "bonding" which the court relied on. First, when the child was only five months old, to find it was in the child's best interest to sever her ties to her father, and later to support a finding of detriment should the child be removed from the placement couple.

Thus, this case is unlike *Michael U. v. Jamie B.* 39 Cal.3d 787, where the department *returned* the child to the mother once the natural father expressed a desire for custody and third parties litigated the section 7017 action and the natural mother is the person whose conduct prevented the father from developing his parental interest. Further, it appears different from the case of *In Re Tricia M.* 74 Cal.App.3d 125, where *this same agency* apparently maintained the relinquished child in foster or temporary placement until the section 7017 proceedings were held, thus not bringing into play the "bonding" aspect.

In addition to addressing these concerns, the parties should address the dispositions presently available to this court should it find the Department has violated Edward's constitutional right to develop his protected parental interest. In this context counsel should address the precedential effect of the California Supreme Court decision of Baby Girl M.

Very truly yours,

/s/ Felix Quenga for
KEENAN G. CASADY
Clerk

In the Court of Appeal of the State of California
Fourth Appellate District
Division One

[Slip Opinion of the Court, filed April 30, 1987, Jurisdictional Statement Appendix, p. 1a.]

[Concurring opinion, Work, J., Jurisdictional Statement Appendix, p. 15a.]

[Dissenting opinion, Lewis, J., Jurisdictional Statement Appendix, p. 24a.]

[Order modifying opinion, filed May 21, 1987, Jurisdictional Statement Appendix, p. 35a.]

[Order denying leave to file petition for rehearing amicus, filed May 18, 1987, Jurisdictional Statement Appendix, p. 68a.]

In the Supreme Court of the State of California

[The Petition for Hearing, filed June 8, 1987, is part of the certified record in 4th Civil No. D003076 of the California Court of Appeal.]

[Order Denying Review After Judgment By The Court of Appeal, filed July 30, 1987, Jurisdictional Statement Appendix, p. 69a.]